Supreme Court, U.S.
FILED

961325 FEB 18 1997

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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

MOUNT JUNEAU ENTERPRISES, INC.,
ALASKA TRAMS, INC., ARNT I. ANTONSEN,
CHARLES KEEN AND KAREN KEEN
Petitioners,

v.

THE CITY AND BOROUGH OF JUNEAU
(a municipal corporation), et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

WEIDNER & ASSOCIATES, INC.
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IN THE SUPREME COURT FOR THE STATE OF ALASKA

MOUNT JUNEAU ENTERPRISES, INC., ALASKA TRAMS, INC., ARNT I. ANTONSEN, CHARLES KEEN and KAREN KEEN, Plaintiffs/Appellants, vs. THE CITY AND BOROUGH OF JUNEAU (a municipal corporation), et al., Defendants/Appellees.	) Supreme Court) No. S6611

Trial Court No. 1KE-91-642 CI

ORDER

IT IS ORDERED;

The petition for rehearing, filed on November 6, 1996, is DENIED. Entered by direction of the Alaska Supreme Court [Eastaugh, and Fabe. Justices, not participating].

SC #1KE-91-642 CI cc; Justices. Judge Zervcs. TD Appeals Clerk/Juneau. Publishers (West Publishing and Mead). Opinion #4396 - September 6, 1996.

Dated this 20 day of November, 1996.

Clerk of the Appellate Courts

IN THE SUPREME COURT OF THE STATE OF ALASKA

MOUNT JUNEAU ENTERPRISES, INC., ALASKA TRAMS, INC., ARNT I. ANTONSEN, CHARLES D. KEEN, and KAREN KEEN,	) Supreme Court) No. S-6611
Appellants,	
v.	) Superior Court) No.) 1KE-91-642CI
THE CITY AND BOROUGH OF JUNEAU (a municipal corporation), BRUCE BOTHELHO, CAREN ROBINSON, ROSALEE T. WALKER, KIM S. ELTON, DENNIS W. EGAN, ROSIE PETERSON ERROL CHAMPION, GEORGE DAVIDSON, JOHN MacKINNON, DEVIN RITCHIE, BARBARA BLASCO, and MURRAY WALSH,	) OPINION) [No.4396 -) Sept. 6, 1996]
Appellees.	

Appeal from the Superior Court of the State of Alaska, First Judicial District, Ketchikan, Larry c. Zervos, Judge.

Appearances: Phillip Paul Weidner, Weidner & Associates, Inc., Anchorage, for Appellants. Avrum M. Gross and Susan A. Burke, Gross & Burke, Juneau, for Appellees.

Before: Rabinowitz, Matthews, and Compton, Justices. [Moore, Chief Justice, and Eastaugh, Justice, not participating.]

RABINOWITZ, Justice.

I. INTRODUCTION

This appeal involves an interwoven property right and contractual dispute surrounding a failed attempt by Charles Keen to construct a tram to the top of Mount Juneau.

II. FACTS AND PROCEEDINGS

There are two separate sets of facts underlying the issues of this appeal, those relating to the tunnel claim and those relating to the tram claims.

A. The Tunnel Claim

In 1913, the Alaska Juneau Gold Mining Company (AJ) obtained an easement to construct and maintain a tunnel underneath the Red Jacket and White Wing mining claims. The easement granted AJ, "its successors and assigns forever, the right to drive, construct and maintain" a 9' by 14' tunnel under the Red Jacket and White Wing mining claims to enable the AJ "to construct and perpetually maintain a transit tunnel in and through which to lay water pipes, flumes and other conduits for the purpose of conveying water..."The tunnel connected the two already existing ends of what is known as "Tunnel No. 3."

On January 3, 1974, AJ Industries conveyed its rights in the tunnel to the Alaska Electric Light & Power Company (AEL&P) by a statutory quitclaim deed. That June, AEL&P granted the City and Borough of Juneau (City) a permanent easement specifically authorizing the City to use the tunnel for "the transmission and storage of water." From September 1977 to April 1979, contractors for the City worked to convert the tunnel into a public water reservoir. The entire project was accepted as complete on November 1, 1979; however, additional work continued until May 1982.

Sometime in 1972, Charles Keen became interested in purchasing the Red Jacket and White Wing mining claims overlying the tunnel. He contacted Leonard Idso, who was paying taxes on the property at the time, and apparently obtained an option to purchase the property. The

first record of Keen's interest in the property is an earnest money agreement, dated October 5, 1981, between Keen and Idso for the sale of property including the Red Jacket and White Wing mining claims. The agreement provides that the purchase price for the two mining claims, as well as a third mining claim, was $10,000. The agreement also states that the real property was to be conveyed subject to "easements of record." A statutory warranty deed from Idso to Charles and Karen Keen for the three mining claims was executed on October 16, 1981, and on October 22, 1981, the Keens quitclaimed their interest to Alaska Trams, Inc.

Keen testified in his deposition that he first learned of the City's use of the tunnel either just prior to or immediately after his purchase.[1] Keen testified that, at some time after the purchase, he and his wife saw a map at the municipal building showing the City's use of the tunnel. He advised the City that a mistake had been made and thereafter took the position that the City was trespassing on his property.

B. The Tram Claims

In 1976, the City became involved in Keen's plans to build a tram to the top of Mount Juneau. The first plan called for a tramway from a base terminal on South Franklin Street to the top of Mount Juneau with a mid-point tower on Gastineau Ridge. The City leased a piece of land on Gastineau Ridge to Alaska Trams for the mid-point tower and issued a conditional use permit that would allow the construction. In 1978, the City sold Keen some land on South Franklin Street to be used for the base terminal. The deed of sale contained a reversion clause providing that the City could repurchase the land if it was not used to develop the tram within four years. The deadline, however, was extended several times. In 1984, the City modified its procedures and

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[1] In the late 70s, Keen learned that the City was converting a tunnel into a water reservoir. He claimed that he contacted City officials but was assured that the tunnel being converted was not the same tunnel he was interested in purchasing.

required contractors with conditional use permits to secure building permits and begin construction within 18 months. Keen applied for a new permit, set to expire in February 1986, based on the same plan outlined in 1976.

On February 25, 1985, Keen offered to waive all of his potential tunnel claims against the City if the City would deed him the property he already owned on South Franklin Street free of the reversion clause, deed him the land owned by the City on Gastineau Ridge and at that time leased to Keen for the mid-point towers, grant him certain air rights over City property, and "road deed access and parking space . . . over City property" to his mining claims. After an initial ordinance reflecting similar terms, Ordinance No. 85-53am, was introduced and passed. The provision required Keen to submit surveys describing the as yet unspecified location, extent and scope of the easements for the road and the parking lot "at a location and size to be approved by staff in accordance with existing planning and zoning standards."

At the time Ordinance 85-53am was adopted, Keen's conditional use permit authorized the placement of mid-point towers on Gastineau Ridge. However, Keen then decided to change the plans for the tram due to a dispute over air rights. Instead of having the tram begin on South Franklin Street, the new plan located the base of the tram on one of Keen's mining claims in Gold Creek Basin. In August of 1985, the City apparently concluded that the new plan would have to be evaluated by the Planning Commission and that Keen would have to proceed through the conditional use permit procedure. Keen's representative was subsequently informed that the new plan would require a zoning change and a new conditional use permit.

In late 1986, the City Manager requested Keen to provide the survey required under Ordinance 85-53am. Specifically, he noted that the granting of an easement "for a road and parking lot over city and borough property connecting Red Jacket, White Wing, and Black Diamond mining claims to the nearest existing road" was conditioned on Keen "providing the manager with a stamped survey, describing the location, scope and extent of the easement at a

location and size to be approved by staff in accordance with existing planning and zoning standards."

Keen eventually applied for a zoning change for the land near his mining claims. However, because of numerous problems identified with that plan, Keen and the City agreed to come up with an alternative plan. Under the alternative plan, the base terminal would be located on South Franklin Street as envisioned by the original plan, but it would be located on City land to avoid any dispute over air rights. The City issued a new conditional use permit for this plan in April of 1987.

Keen's representatives and the City worked to prepare Ordinance No. 87-30 which provided for the conveyance of City land on South Franklin Street to Keen in exchange for Keen's release of his tunnel trespass claims against the City. The ordinance was hotly debated at the Assembly meeting on May 4, 1987, and it ran into heavy public opposition due in part to the lack of an appraisal value for the tunnel claim. The ordinance was defeated 3 vote of the Assembly.

In the meantime, several events of importance were taking place. First, in mid-1986, Alaska Trams filed for Chapter 11 bankruptcy. Second, City attorneys interpreted Ordinance No. 85-53am simply as an ordinance designed to settle the tunnel claims by authorizing the City Manager to negotiate a settlement and to transfer City land as part of the deal. Keen, on the other hand, had always contended that the ordinance was a binding contract. Third, City attorneys and some City assembly members were concerned that Keen's tunnel claim was worthless and an appraisal was eventually ordered to value the claim.

Keen's representatives and the City subsequently began to work on Ordinance No. 87-34 to address the problems which led to the defeat of Ordinance No. 87-30. The appraisal, received prior to the Assembly's final action on Ordinance No. 87-34, concluded that the tunnel claim was valueless. Thus, the Assembly directed City staff to remove certain reversion and repurchase provisions in

Ordinance No. 87-34 and to provide for the sale of City land at fair market value subject to a discount to reflect the litigation value of Keen's claim. This version of the ordinance was passed by the Assembly.

Keen did not support this ordinance and refused to negotiate a credit for settling the tunnel claim. Keen approached the City and requested that the land transfer be separated from the issues surrounding the tunnel claim. The Assembly then passed Ordinance No. 88-03 which authorized conveyance of the property to Alaska Trams for an established price without requiring him to compromise the tunnel claim. The ordinance also required Keen to undertake certain actions before obtaining title to the property, including providing necessary surveys. These conditions were to be met by December 5, 1988, but due to delays, the land transfer was not completed until July 12, 1989.

In the meantime, the 1987 conditional use permit was set to expire in October of 1988. Prior to the expiration, Keen applied for and was granted a "fast track authorization" permit (FTA) that would allow him to build the project in phases. The permit required the work to commence by April 28, 1989, and that "construction activity shall continue without interruption until all work of the lower and mid terminal lower tram is accomplished."

No work was commenced prior to "April 28, 1989 and the starting date was extended until October 9, 1989. Work commenced prior to that date and continued sporadically until the spring of 1990. On October 29, 1990, Keen and City staff agreed to the conditions under which the FTA would be continued in force even though Keen's work on the project had stopped. Specifically, Keen agreed to provide insurance to cover damages to adjoining landowners and to provide a written guarantee from a reputable contractor that if Keen did not complete the lower retaining wall by April 30, 1991, the contractor would do so. Keen failed to deliver the insurance and guarantee, and the City set a January 22, 1991 deadline for Keen's performance of the agreement.

At about this time, the Alaska Trams bankruptcy was converted into an involuntary Chapter 7 proceeding, and the City began to deal with the bankruptcy trustee. The City extended the insurance coverage and building commitment deadline until February 1, 1991 at the request of the bankruptcy trustee. The insurance was then finally posted and a contractor signed an agreement to complete the work if Keen failed to complete it. However, the contractor's guarantee was conditioned on Mount Juneau Enterprises' retaining the building permits.

On January 25, 1991, the City Manager, Kevin Ritchie, was interviewed by a radio reporter. Ritchie stated that he could not think of a good reason to extend the permit past its last expiration date for Keen, but that the City would cooperate with the bankruptcy trustee. The City and the bankruptcy trustee began to discuss the status of the permit. The City informed the trustee that if the project was cancelled for reasons beyond Alaska Trams' control, the City would be able to refund 527,000 of the unexpended building permit fees to the bankruptcy estate. The trustee subsequently informed the City that the project was cancelled.

Mount Juneau Enterprises immediately objected to the cancellation, and filed a motion before the bankruptcy court seeking to enjoin the trustee from canceling the project. A hearing was held on March 8, 1991. The bankruptcy judge refused to enter an order, but ruled that the trustee had not effectively cancelled the project, and that the proper procedure to follow for cancellation of the project was to move for abandonment.

Immediately after the hearing, the City Manager wrote to Keen and the Assembly advising them of the judge's ruling and stating that the City would determine whether all the conditions of the building permit had been satisfactorily met. He invited Keen to meet with him and discuss the matter. A meeting was held.[2]

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[2] The meeting was apparently very difficult. Keen believed that Ritchie's statements to a radio reporter and newspaper had effectively ended his hopes

The city agreed to confirm in writing that the permit was valid, and extended the time period within which Keen was to complete the retaining wall until May 31, 1991.

However, Keen did not comply with the new deadline, and on June 23, 1991, he filed this suit against the City. Counts 1 through 5 of Mount Juneau Enterprises' complaint concerned the tunnel claim and included a claim for damages for trespass. Counts 6 through 13 concerned the tram claims and included claims for damages for breach of contract and fraud. The City subsequently informed Keen that the permit had expired.

After extensive discovery, both parties moved for summary judgment. Following oral argument, the superior court concluded that there were no issues of material fact concerning any of the claims and entered final judgment in favor of the City. Mount Juneau Enterprises appeals.

III. STANDARD OF REVIEW

This is an appeal from the superior court's grant of summary judgment in favor of the City. In reviewing a grant of summary judgment, this court applies a de novo standard of review and determines whether there are any genuine issues of material fact, and whether the moving party is entitled to judgment on the law applicable to the established facts. Farmer v. State, 788 P.2d 43, 46 n.8 (Alaska 1990); Zeman v. Lufthansa German Airlines, 699 P.2d 1274, 1280 (Alaska 1985).

Mount Juneau Enterprises also appeals the superior court's denial of a motion to continue discovery under civil Rule 56(f). This court reviews a trial court's decision on whether to permit further discovery under Civil

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for financing and caused great injury to the tram project. Keen apparently stated that he would not attempt to resolve the matter unless the City took out a full page newspaper ad apologizing to him. No such ad, however, was ever run by the City.

Rule 56(f) for an abuse of discretion. Munn v. Bristol Bay Housing Auth., 777 P.2d 188, 192 (Alaska 1989).

IV. DISCUSSION

A. The Tunnel Claim

The superior court concluded that the City had acquired title to the tunnel through inverse condemnation, that the condemnation had occurred before Keen obtained any interest in the tunnel and, accordingly, denied Keen's clams for damages for trespass or condemnation for a taking of property. On appeal, Keen argues that the superior court erred in determining that the City had inversely condemned the tunnel. Keen also argues that, even if the City had inversely condemned the tunnel, he has a right to compensation by virtue of his option to purchase.

1. TresDass Damages

Subsections (4) and (5) of AS 09.55.240(a) provide that municipalities may use the power of eminent domain to condemn "sites for reservoirs necessary for collecting and storing water." An inverse condemnation occurs when a governmental entity takes private property for public purposes under the good-faith but mistaken belief that the taking does not require the exercise of eminent domain. State. Department of Highways v. Crosby, 410 P.2d 724, 728-29 (Alaska 1966).

The doctrine of inverse condemnation was the basis of this court's decision in Wickwire v. City & Borough of Juneau, 557 P.2d 783 (Alaska 1976). In Wickwire, the City mistakenly placed a sewer line on Wickwire's property. Although Wickwire asserted a trespass claim, as did Mount Juneau Enterprises in this case, we concluded that the landowner's only remedy in such a case "is an inverse condemnation action for just compensation for the value of the easement on the date of taking . . . ." Id. at 784.

Keen's only argument that no inverse condemnation took place in this case is that the City's belief

that it owned an easement sufficient to construct the reservoir was not a good-faith belief since a title search would have revealed that AEL&P did not have the power to convey this interest. We do not agree that the City's reliance on AEL&P's easement is inconsistent with a good-faith but mistaken belief that there was no need to exercise eminent domain powers. Accordingly, we conclude that the City inversely condemned the tunnel sometime in the mid-1970s and that Mount Juneau Enterprises could not, therefore, be entitled to damages for trespass.

2. Compensation for Inverse Condemnation

Generally, "when there is a taking of property by eminent domain in compliance with the law, it is the owner of the property at the time of the taking who is entitled to compensation." 2 Sackman, Nichols on The Law of Eminent Domain § 5.01[4], at 5-29 (Rev. 3d ed. 1993).[3] This right is a personal one which does not pass to a subsequent purchaser unless the parties explicitly agree to that arrangement. Wickwire, 557 P.2d at 785 n.7; see also Williams v. City of Valdez, 624 P.2d 820, 821 (Alaska 198I). The agreement signed by Keen and Idso in 1981 nowhere provides for such a transfer. Since Keen was not the owner of the property on the date of the taking and did not receive any right of action against the government in his deed, he is not entitled to compensation as the owner of this easement.

For purposes of this appeal, however, we must assume that Keen had an option to purchase the claims at the time that the City commenced construction of the and we must consider the significance of this option. There is a recent trend favoring "the conclusion that the owner of an unexercised option to purchase land possesses a property right which is compensable in eminent domain ...." 2 Sackman, § 5.03[1], at 5-72 and 5-73. The leading case taking this approach is County of San Diego v. Miller, 532 P.2d 139

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[3] Wickwire defines the date of the taking as the date when the construction began. 557 P.2d at 784 n.4.

(Cal. 1975), in which the California Supreme Court held that the owner of an unexercised option to purchase land possesses a property right which is a compensable interest in a condemnation action. To this effect, the Miller court stated as follows:

> [C]ompensation issues should be decided on considerations of fairness and public policy. "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness of property law." "[T]he right to compensation is to be determined by whether the condemnation has deprived claimant of a valuable right rather than by whether his right can technically be called an 'estate' or 'interest' in the land."

Miller, 532 P.2d at 143 (citations and emphasis omitted). The court held that the measure of damages to the option is the excess, if any, of the total award above the optioned purchase price.[4] Id. at 144.

Although we agree that an option does create a compensable interest in property and that, in some cases, an option-holder may be entitled to some proceeds from an inverse condemnation action, Keen's allegations in this case

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[4] This approach has been adopted by a number of states. Texaco, Inc. v. Commissioner of transportation, 383 A.2d 1060 (Conn. 1977); Sholom, Inc. v. State Roads Comm'n, 229 A.2d 576 (Md. 1967); State v. Las Veaas Bldg. Materials, Inc., 761 P.2d 843 (Nev. 1988); Fullington v. M. Penn Phillips Co., 395 P.2d 124 (Or. 1964); In re Petitioner of Governor Mifflin Joint School Auth., 164 A.2d 221 (Pa. 1960); Spokane School Dist. No. 81 v. Parzybok, 633 P.2d 1324 (Wash. 1981).

are simply not sufficient to support such a claim. In his affidavit, Keen stated as follows:

> I can state with certainty that I purchased this option in 1971 or 1972. I do not remember the amount I paid for the option. I did not keep a copy of this option. My wife and I are not sophisticated bookkeepers and at the time I had no idea that the option agreement would become an important document. In 1981 when we exercised the option to purchase and received a warranty deed we did not believe the option agreement was necessary to keep anymore.

The fact that Keen held some kind of an option to purchase the land in question is not alone sufficient to entitle him to compensation. The proper inquiry should focus on the extent to which his option diminished in value as a result of the City's actions. In order to calculate this amount, Keen would have to introduce the terms of the option itself with adequate specificity; he has failed to do so.

Without any evidence of the terms of the option, it is impossible to determine whether the condemnation has deprived Keen of a valuable right, thus warranting compensation. See Miller, 532 P.2d at 143. If, for example, the option allowed Keen to purchase the property at a price of one dollar at any time before the year 2000, the option may have diminished in value as a result of the City's actions to nearly the full extent of the value of the taking. On the other hand, if the option was merely a right of refusal, the diminution of value would probably be negligible.

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[5] In a supporting affidavit, Robert Slatzer described the option as "a hand-written document which was an option of first refusal to purchase the

Because Mount Juneau Enterprises can neither produce the option agreement nor any evidence of its terms, it has failed to raise a material fact as to whether the condemnation deprived Keen of a valuable right.[6] See Alaska-Canadian Corn. v. Ancow Corp., 434 P.2d 534, 537-38 (Alaska 1967). Based on the foregoing, we conclude that summary judgment was appropriate as to the tunnel claim.[7]

B. The Tram Claims

1. Ordinance No. 85-53am

The superior court concluded that Ordinance No. 85-53am established certain rights and duties in the City and Alaska Trams, but that the City did not violate the terms of the ordinance. To this effect, the superior court stated:

> There is no legitimate issue in dispute on this claim. Alaska Trams was required, as a

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land on which the tunnel was located." (Emphasis added). Although he had a copy of the option in his possession, Slatzer is apparently unable to recall any of the specific terms.

[6] The City accurately summarizes the state of the evidence relating to the terms of the option as follows:

"Keen does not remember the date of the option (Keen Dep. at 951); or the terms of the option (Keen Dep. 954, 959-960); or whether he paid anything for the option (Keen Dep. at 1009). He does not remember if the option was written or verbal (Keen Dep. at 952). He does remember that he was not legally obligated to buy the property (Keen Dep. at 954) though he cannot remember whether the owners were obligated to sell. (Keen Dep. at 959-960.) At one point, he asserted it was a "first refusal option" that would entitle him to a "first refusal option" when the family got some legal matters "cleared up." Keen didn't "have a clue" what the legal matters were. (Keen Dep. at 954-55.) Keen cannot remember whether the option could be revoked or, if so, under what circumstances. (Keen Dep. at 973)."

[7] In light of this holding we need not consider the question of whether the City gained title to the easement by adverse possession.

> condition precedent to the City's performance, to provide a stamped survey showing the location and size of the easement that could be approved by City staff in accordance with planning and zoning ordinances. This was never done. . . .
>
> A new route was planned and eventually land transferred and work begun. There is no breach by the City, or by Alaska Trams for that matter concerning the new plan. The parties just agreed to do something else.

On appeal, Mount Juneau Enterprises argues that the City breached the contract embodied in Ordinance No. 85-53am.

Ordinance No. 85-53am authorized the City Manager to transfer certain City land to Keen in exchange for Keen's abandoning the tunnel claim against the City. Part of the property to be conveyed was described in Section 3(a) of the ordinance, which stated as follows:

> Section 3. Land and Easement Conveyances. In exchange for a conveyance by Chuck Keen as representative of Alaska Trams of an unrestricted easement, in perpetuity, consisting of Water Tunnel No. 3 so that the City and Borough of Juneau may continue its existing use of the tunnel as a water reservoir, the manager is authorized to convey to Chuck Keen:

> (a) an easement for a road and parking lot over city and borough property connecting Red Jacket, White Wing and Black Diamond mining claims to the nearest existing road. The grant of the easement shall be conditioned on Chuck Keen providing the manager with a stamped survey describing the location, scope and extent of the easement at a location and size to be approved by staff in accordance with existing planning and zoning standards.

Keen never provided the City with a stamped survey, and it was eventually determined that Keen was not likely to get the zoning change approved. Thus, Keen and the City agreed to come up with an alternative plan. Since Keen failed to meet the conditions for conveyance of the land in Ordinance No. 85-53am in the first place, the City's actions would not have amounted to a breach even if a contract had been formed.

Mount Juneau Enterprises argues that Ordinance No. 85-53am constituted a binding agreement that the City would transfer land to Keen in exchange for Keen's agreement to abandon the tunnel claim. Such an agreement was based on the assumption that-the tunnel claim was valuable. Thus, Mount Juneau Enterprises seems to argue that even though the original agreement had been mutually abandoned, the City was still obligated to treat Keen's tunnel claim as valuable in subsequent negotiations, and to transfer land to Keen in exchange for Keen's agreement to abandon the claim. Apparently, the City was supposed to treat the claim as valuable even after determining that it had no value.

The City cites City of Louisville v. Fiscal Court of Jefferson County, 623 S.W.2d 219 (Ky. 1981) for the proposition that a legislative body may not bind itself to

future legislative action. In that case the Supreme Court of Kentucky considered a contract allegedly resolving a dispute over annexation, where the City had agreed to limit certain future tax rates and to cooperate fully with the owners of the annexed property in applications for zoning changes. The court stated as follows:

> The law is clear that a legislative body may not limit its power to act one way or another in the future in governmental as opposed to proprietary, functions.

Id. at 224. The court then stated:

> Not only does the contract place an obligation on the city which may create conflicts of interest, but it also creates an obligation to legislate in the future. The area of zone changes, changes in street entrances, flood control, etc., are all legislative in nature. A contract which binds a legislative body, present or future, to a course of legislative action is void against public policy.

Id. at 225 (citations omitted).

The conveyance of City land can only be authorized by the Assembly. See CBJ Ordinance 53.09.200. Thus, even if Ordinance No. 85-53am constituted a contract providing that the City would both treat Keen's tunnel claim as valuable in the future and transfer land to Keen in exchange for an agreement to abandon it, such a contract would likely be unenforceable because it requires future legislative action. That is, it would require the Assembly to agree in advance to authorize the exchange of unspecified parcels of land in the future.

Based upon on the foregoing, we conclude that even if Ordinance No. 85-53am did create a contract of some sort between Keen and the City, the City did not violate any enforceable obligations in the course of its negotiations with Keen.[8]

2. The Building Permits

The superior court granted summary judgment in favor of the City on Mount Juneau Enterprises' claims relating to the building permits on three grounds: failure to exhaust administrative remedies, statutory immunity for discretionary acts under AS 09.65.070(d)(2), and statutory immunity for actions relating to building permits under AS 09.65.070(d)(3). On appeal, Mount Juneau Enterprises challenges the superior court's conclusions that it failed to exhaust administrative remedies and that the City had discretionary immunity under AS 09.65.070(d)(2).

In Ben Lomond, Inc. v. Municipality of Anchorage, 761 P.2d 119 (Alaska 1988), rather than appealing the revocation of its building permit, Ben Lomond filed suit against the Municipality based on a claim of unconstitutional deprivation of property. We held that the failure to appeal the revocation of a building permit under applicable municipal appeal procedures barred any judicial action for damages based on the revocation. Id. at 121-22.

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[8] Mount Juneau Enterprises also argues that the City should be estopped from denying that Ordinance No. 85-53am constituted a settlement of the tunnel litigation. Estoppel may apply where there is: (1) an assertion of a position by conduct or word; (2) reasonable reliance thereon; and (3) resulting prejudice. Municipality of Anchorage v. Schneider, 685 P.2d 94, 97 (Alaska 1984). It was not reasonable for Keen to rely on Ordinance No. 8S-53am when it was Keen who failed to provide the City with the necessary stamped survey. Moreover, Mount Juneau Enterprises argues that Keen and Alaska Trams spent hundreds of thousands of dollars on construction of the tram and that the City "should be estopped from taking away the building permits to gain advantage in the tunnel litigation." However, Keen is the one who let the permit expire on its own terms. Keen's estopped arguments are without merit.

We stated that whether a court should require exhaustion of administrative remedies "turns on an assessment of the benefits obtained through affording an agency an opportunity to review the particular action in dispute." Id. at 121. To this effect, we noted that the basic purpose of the doctrine of exhaustion of administrative remedies is "to allow an administrative agency to perform functions within its special competence -- to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." Id. at 122 (citation omitted).

In Eufemio v. Kodiak Island HODS., 837 P.2d 95, 98 (Alaska 1992), we held that, in applying the doctrine of exhaustion of administrative remedies, a court must determine the following:

> 1) is exhaustion of remedies required; 2) did the complainant exhaust those remedies; and 3) is the failure to exhaust remedies excused?

The City has an ordinance specifically providing for an independent Board of Appeals to review disputed decisions or orders of the City building official. See CBJ Ordinance 19.02.010. The ordinances relating to building permits are contained within that same title.

Since an administrative appeal is clearly provided for, exhaustion of remedies is required in this case. Mount Juneau Enterprises did not avail itself of these appeals provisions. However, Mount Juneau Enterprises argues that the failure to exhaust remedies should be excused because (1) this suit was filed before the final administrative decision was made; (2) the final decision did not provide proper notice of the right to appeal; and (3) an appeal to the Board of Appeals would have been futile.

We find the first and third reasons to be without merit. And as to the second reason, Keen was given actual notice of the existence of the appeal provisions in a letter granting an extension of the FTA in 1989. Accordingly,

we find that all claims regarding the building permits are barred as a result of Mount Juneau Enterprises' failure to exhaust its administrative remedies.[9] Since the claims are barred, we need not reach the issue of whether the City is immune from suit under AS 09.65.070(d)(3) or AS 09.65.070(d)(2).

C. Further Discovery

Mount Juneau Enterprises filed a motion before the superior court to stay ruling on the motions for summary judgment pending further discovery under civil Rule 56(f).[10] The superior court denied the motion because Alaska Trams had sixteen months within which to conduct discovery,[11] Alaska Trams did not file an affidavit as required by the rule, the superior court did not believe that a genuine

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[9] Counts 7 and 8 of Mount Juneau Enterprises' complaint allege breach of contract arising out of the building permits. However, building permits are not contracts. 9A McQuillin, The Law of Municipal Corporations § 26.212, at 225 (3d ed. 1996). See also Rehmann v. City of Des Moines, 215 N.W. 957, 960 (Iowa 1927) ("a permit is merely a privilege to do what would otherwise be unlawful, and is not a contract between the authority, federal, state, or municipal, granting it and the person to whom it is granted").

[10] Civil Rule 56(f) provides as follows:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

[11] To this effect, the superior court stated as follows:

Alaska Trams had sixteen months to conduct discovery in this case. (The suit was filed in June of 1991 and Judge Schulz imposed a stay of discovery in November of 1992.) During that time thousands of pages of documents have been disclosed, numerous depositions have been conducted, alleged privileged materials have been turned over or offered for inspection in camera. The deposition of the City's attorney, Barbara Blasco, alone, was close to 1000 pages;

issue of material fact would emerge from further discovery, and the superior court questioned the diligence of Alaska Trams. Civil Rule 56(f) specifically requires that an affidavit be filed with a motion for further discovery. See Munn, 777 P.2d at 192-93; Jennings v. State, 566 P.2d 1304, 1313-14 (Alaska 1977).

For the reasons expressed by the superior court, we conclude that it was not an abuse of discretion to deny the motion requesting further discovery.

V. CONCLUSION

The superior court's grant of summary judgment in favor of the City is AFFIRMED in all respects.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

MOUNT JUNEAU ENTERPRISES, INC., ALASKA TRAMS, INC., ARNT I. ANTONSEN, CHARLES D. KEEN, and KAREN KEEN,

Plaintiffs,

v.

THE CITY AND BOROUGH OF JUNEAU (a municipal corporation), BRUCE BOTHELHO, CAREN ROBINSON, ROSALEE T. WALKER, KIM S. ELTON, DENNIS W. EGAN, ROSIE PETERSON ERROL CHAMPION, GEORGE DAVIDSON, JOHN MacKINNON, DEVIN RITCHIE, BARBARA BLASCO, and MURRAY WALSH,

Appellees.

No. 1KE-91-642 CI

DECISION ON MOTIONS

The Defendants in this case, collectively referred to as the City, have moved for summary judgment on 16 or the 17 counts of the Complaint.

In June of 1913, Kohn, Caro and Reck received patent to their three claims. Unfortunately, by 1949 the owners were delinquent in their tax payments and the Juneau Independent School District foreclosed on the claims. On September 28, 1954, J.S. Caro and A.R. Duncan paid the delinquent taxes and received a tax deed to the claims.

In 1968, the Alaska Juneau Gold Mining Company merged with other interests and became AJ Industries, Incorporated. AJ Industries Becky the successor

to all property and easements owned by the Alaska Juneau Gold Mining company.

Later, on January 3, 1974, AJ Industries conveyed its interest in Tunnel No. 3 to Alaska Electric Light and Power Company by a statutory quitclaim deed.

In the meantime, beginning sometime in 1972, Charles Keen, one of the plaintiffs in this case, had an idea to turn Tunnel Number 3 into a tourist attraction. Keen knew that the tunnel had been used as a tourist attraction in the 60's, and thought he might be able to expand upon this idea. He learned that the tunnel ran under the Red Jacket and White Wing mining claims. He went to the Borough assessors office and learned that a Mr. Leon Idso had been paying the taxes on the claims for many years. He contacted Idso, and Idso told him he had purchased the tax deed on the claims.[12]

Keen acquired an option to purchase the claims from Idso. At his deposition, Keen could not remember the date he acquired the option although in his affidavit he states that he believes he acquired it in 1971 or 1972. So does not remember how much he paid for the option, and at his deposition he did not even know if it was in writing. Later, in his affidavit, Keen implies that the option was a written agreement. He is also vague about the terms of the agreement.

About the time Keen acquired the option, he also began to consider a plan to build an aerial tram from downtown Juneau to the top of Mount Juneau. He thought that the three claims, which are located on Mt. Roberts and on the way up to Mt. Juneau, would make a good place for the mid-point tram tower.

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[12] The sale from Caro and Duncan to Idso it not clearly established in the record This ambiguity, apparently, resulted in a lawsuit that was brougiit by Duncan's successors in 1985. This suit was eventually settled such that this conveyance is not now an issue.

Also, about this time, the city began to consider using one of the old AJ tunnels as a water reservoir Alaska Electric conveyed a permanent easement for the transmission and storage of water in tunnel Number 3 to the city on June 18, 1974.

Studies for the development of the tunnel as a water reservoir were conducted, and in 1977 the city appropriated funds for the project. A contract for the construction was awarded and construction began in September of 1977. The reservoir was completed in late 1978 and filled with water in the spring of 1979. A major leak And other problems were discovered. The leak was repaired and the tunnel reservoir contract was deemed completed on November 1, 1979. The tunnel has been used for water storage since October 31, 1979. However, there were continuing problems and additional work was necessary construction was not considered complete until day of 1982.

Keen heard and read that the City was capping a tunnel for water storage. He was concerned and contacted duty officials but he testified that he was assured that the tunnel being capped was not the same tunnel he was interested in. On October 5, 1981, Keen exercised his option on the three claims and signed an earnest money agreement with Leonard Idso Keen purchased the three claims for $5000 in cash and a note to pay another $5000 within ninety days of closing. The agreement provided for the sale of the three claims but also specifically provided that no personal property was being transferred. In addition, the agreement provided that the claims were conveyed subject to "easement of record." The Keens quitclaimed their interest in the claims to Alaska Trams on October 22, 1981.

Keen has testified, somewhat confusingly that he first learned that the tunnel under his claims was the tunnel being used as a water reservoir just prior to the purchase of the claims or just after the purchase. At any rate, after he found out about the water reservoir, he notified the City that it was trespassing. After lengthy negotiations failed to resolve the claims concerning Tunnel Number 3, Alaska Trams

brought suit over the tunnel in a bankruptcy proceeding on October 5, 1987. This suit was filed June 25, 1991.

THE CITY'S MOTION FOR SUMMARY JUDGMENT ON TUNNEL CLAIMS

The City has filed a motion for summary judgment on Counts 1 - 5 in the complaint. These counts concern the tunnel claims. A motion for summary judgment requires the court to determine whether genuine issues of material fact exist and whether the moving party is entitled to summary judgment as a matter of law. Zeman v. Lufthansa German Airlines, 699 P 2d 1274, 1280 (Alaska 1985) The moving party has the burden or showing that there are no genuine issue or fact in dispute. McGee Steel Co. v. State, McDonald Industries, 723 P 2d 6ll, 615 (Alaska 1985) The opposing party is not required to demonstrate that they will prevail at trial. Rather, after the moving party has met its burden, the opposing party must show that genuine issues at material fact exist. All reasonable inferences of fact must be drawn against the moving party. Champion Oil Co. v. Herbert, 578 P 2d 961, 963 (Alaska 1978), cert denied, 439 U S 980, 58 L Ed.2d 650 (1979) A material issue of fact in dispute exists if reasonable jurors could disagree on the resolution of the factual issue. McGee, 723 P 2d at 614.

The City argues that there are no genuine issues of material fact in dispute, and that summary judgment must be granted in its favor because, as a matter of law, it has a valid easement to use the tunnel as a reservoir or, if the easement does not cover use of the tunnel as a reservoir, its use of the tunnel is permissible under the doctrines of inverse condemnation or adverse possession.

The court need not address the easement or adverse possession arguments since the City's taking of the tunnel constituted an inverse condemnation.

AS O9 SS 240(a)(4) and (5) provide that municipalities may exercise the right of eminent domain for public uses including "sites for reservoirs necessary for collecting and storing water[.]" If a municipal government

takes private property under the mistaken belief that it has a right to do so, then an inverse condemnation occurs. State, Department of Highways v. Crosby, 410 P.2d 724, 728-729 (Alaska 1966); Juneau, 557 P 2d 783, 784 (Alaska 1976).

Here, the city argues that it took the tunnel for public use when the work began to cap the tunnel in 1977. If the city was mistaken in its belief that the easement from Alaska electric included use of the tunnel as a reservoir, then, according to the City, an inverse condemnation occurred on the taking. The City points out that compensation for inverse condemnation is a personal right that is not conveyed by dead to a subsequent owner. Riekniro, 557 P ad at 785; Williams v. City of Valdez, 603 P.2d 483, 490 (Alaska 1979) affirmed after remand:, 624 P 2d 820, 821 (Alaska 1981}; 2 Sachman, Nichols on Eminent Domain, sec. 5.01[4] at 5-29 to 5-35 n.29 (Rev. 3d ed. 1990). Since the taking occurred in 1977, or 1979 when the tunnel was first filled with water, any compensation for the taking is due the owner of the claims at that time and not to Alaska Trams.

The City has met its burden on the issue of inverse condemnation. To defeat summary judgment, Alaska Trams must establish that material issues of fact exist.

Although Alaska Trams does not concede that an inverse condemnation occurred, it does not argue this point. Rather, Alaska Trams raises three arguments that, if correct, would modify the outcome of this dispute under the doctrine of inverse condemnation.

First, Alaska Trams argues that the City did not take the tunnel for inverse condemnation purposes until 1982. By 1982, of course, Alaska Trams owned the mining claims and therefore any compensation due the owner for the taking would be owed to it. This argument is based on some deposition testimony and on the affidavit of Carlton Laird. Mr. Laird was the City Manager from 1980 to 1982 and he remembered that the tunnel was first filled with water in late 1981. Also, this argument is based on the fact that construction was not finally completed until 1982.

In response, the City offers the affidavit of George Porter who was the Director of Public Works in 1978 Mr. Porter says that he knows the tunnel was filled with water in 1979 because he was there and he signed the "Notice of Final Completion" for the tunnel construction project on November 14, 1979 Mr. Porter also says that further construction work did take place after 1979 to remedy problems but this was relatively minor work. Finally, Mr. Porter attests that the tunnel has remained filled with water since 1979 except for brief periods of two or three weeks when it was drained to fix leaks.

In addition, the City argues that even if there is a factual dispute about exactly when the project was completed, that dispute is of no consequence. The City points out that "[W]here an entry is made upon property by the condemnor and an act committed which indicates an intent to appropriate the property, the taking is complete" 2 Suchman, Nichols on Eminent Domain, sec. 6.01[2] at 6-18 to 6-19 n.34 (Rev. 3d ed. 1990). It is not disputed that construction began on the tunnel in 1977. In Wickwire, the supreme court found that the taking occurred when construction began. Wickwire, 557 P.2d at 784. Here, there is no doubt that the City took acts which indicated its intent to appropriate the property in 1977.

Next, Alaska Trams argues that its predecessor in interest (Keen) had an option to purchase the mining claims as of 1972. Based on this option, Alaska Trams argues that it has the right to receive compensation and not the prior owner. The terms of the option are vague and have been variously described as an option to purchase or as an option granting Keen the first right of refusal on any offer to purchase. The document memorializing the option has never been produced. Also, it is not clear that such an option would entitle Alaska Trams to compensation for the inverse condemnation. Alaska Trams cites no cases supporting this proposition. Furthermore, and more importantly, the right to compensation for inverse condemnation is a personal right and not a right that runs with the land. Williams, 624 P.2d at 821; Wickwire, 557 P.2d at 785 n.7. The right to receive compensation for adverse condemnation does not pass to the

buyer unless the parties expressly agree to that arrangement. Wickwire, 557 P.2d at 785 n.7. The earnest money agreement signed by Idso and Keen in 1981 did not mention the right to receive condemnation proceeds. Thus, even if Keen had some interest in the property based on the option, the interest did not include any interest in receiving compensation for the City's taking.

Finally, Alaska Trams argues that due to the negligence and bad faith of the City, it should be able to sue for damages outside the remedy afforded under the doctrine of inverse condemnation. However, the nature of the inverse condemnation doctrine is to allow a landowner to obtain fair market value for property that has been taken by the government by mistake or negligence, Crosby, 410 P.2d at 728-29; Wickwire, 557 P.2d at 784. This doctrine flows from a government agency's right to exercise the power of eminent domain. If a mistake is made or a taking by the government is wrongful, the remedy is inverse condemnation. As already pointed out, Alaska Trams, would not prevail in an inverse condemnation action because it was not the owner at the time of the taking. No authority has been offered by Alaska Trams that would allow a subsequent owner an additional cause of action when that same subsequent owner is not entitled to relief in the inverse condemnation action.

Finally, all the bad faith acts mentioned by Alaska Trams, with one exception, occurred after the taking of the tunnel. While these acts may support other causes of action, and indeed Alaska Trams has relied on these same acts as a basis for other counts in the Complaint, they do not support the extension to the inverse condemnation action Alaska Trams asserts here because they arose too late. The one act complained of that was done by the City before the taking was to rely on the easement received from Alaska Electric. If this was wrong, it was a mistake of the sort that the doctrine of inverse condemnation is specifically created to address.

For the Above reasons, there are no material issues at fact in dispute and summary judgment is granted in the City's favor on Counts 1 - 5 of the Complaint.

STATEMENT OF FACTS -- THE NON-TUNNEL CLAIMS

As already noted, during the time that Chuck Keen was considering the possibilities for the tunnel, he was also thinking about building a tram to the top of Mt. Juneau. Beginning in 1976, the City became involved in Keen's plans for the tram.

The first plan called for the tramway to span the distance between terminus on South Franklin Street and the top of Mt. Juneau. This span required a mid-point tower that was to be located on Gastineau Ridge. To develop this plan, Alaska Trams needed a small piece of City land on Gastineau Ridge for the mid-point tower and a conditional use permit that would allow the construction. The City leased the land and issued the necessary building permit.

Two years later, Keen asked the City to sell him a piece of City-owned land on South Franklin that Alaska Trams needed for the lower terminus of the tram. After negotiation, the City agreed to sell the land but attached a reversion clause to the deed. That clause provided that if the land was not developed into the terminus in four years, the City could buy the land back at the price paid plus interest.

Over the years, the four year deadline was extended by the City several times and the reversion clause was modified so that all Keen had to do to avoid reversion was to make a "substantial start" on the project.

In 1984, the City modified its procedures and required contractors with conditional use permits to secure building permits and begin construction within 18 months. Keen applied for a new permit that was based for the same construction plan originally outlined in 1976. This permit was to expire in February of 1986.

In the meantime, Keen and the City were trying to resolve the dispute over the tunnel. On February 25, 1985, he wrote to the City and made an offer to settle the dispute. That offer, after negotiations, modifications, public input, amendments and one failed attempt by the City Assembly to accept the terns, was finally passed as Ordinance 85-53(am) on July 1, 1985. The Ordinance sought to resolve the tunnel dispute and facilitate Keen's tram project. It provided, in relevant part, that Keen was to give the City an easement for the tunnel and, in exchange, the City would "convey to Keen an easement for a road and parking lot over City property connecting Red Jacket, White Wing and Black Diamond mining claims to the nearest existing road." But the Ordinance conditioned conveyance of this easement "on Keen providing the manager with a stamped survey describing the location, scope and extent of the easement at a location and size to be approved by staff in accordance with existing planning and zoning standards." The language concerning the parking lot and the need to meet existing planning and zoning standards was added by amendment. The Ordinance authorized the sale of the land to Keen that had been leased to him for the mid-point tram tower, and removed the reversion clause from the deed to the South Franklin property.

At some point, Keen decided to change the plans for the tram. He had become involved in an air rights dispute that made development on South Franklin difficult so he decided to forego the plan for locating the lower terminus there. Instead, he decided to place the lower terminus on his mining claims. He envisioned a road and parking lot on City land near his claims. The tram would span the distance from the lower terminal on the claims to the top of Mt. Juneau. Apparently, because the span was shorter, a mid-point terminal was not necessary. Keen claims that the Assembly knew about the change of plans when it passed Ordinance 85-53(am). The City disputes this.

What is clear is that City staff was still under the impression that the original plan was in place until mid-July, 1985. On July 17, 1985, a City Planner, Karen Boorman, wrote to the city Manager And explained the

various zoning and building conditions Alaska Trams would have to meet to complete the project. The memo refers to the 1976 requirements, the 1984 requirements under the conditional use permit, and all the design, parking and zoning specifications that would have to be met. Since the 1976 conditions and the 1984 permit involved the original plan, it seems clear that Boorman, at least, believed the original plan was still in place. A few days later, however, Boorman met with Keen's representatives, and the modifications to the original plan were discussed. On August 12, 1985, in a memo to the City Manager, Boorman wrote that "the project as it is now envisioned..." calls for "a tramway with a terminal base and a parking area in Gold Creek Basin." She concluded that the new plan would have to be evaluated by the Planning Commission and that Keen would have to proceed through the conditional use permit procedure.

Later that same month, Keen was told by Boorman that the new plan would need a new conditional use permit. In September, another City planner told Keen's engineering consultant that the tourist facilities on Gastineau Ridge would require a zoning change or another conditional use permit.

Also in September, the acting city Attorney, John Corso, in a memo to the City Lands Committee, expressed doubt about Keen's title to the tunnel because of a lawsuit between Keen and the Estate of Sidonia Duncan.[13] Corso advised City staff that the land transfers contemplated by ordinance 85-53(am) be delayed until the lawsuit over title to the claims was resolved. Corso also advised that the title dispute might give the City a rare opportunity to negotiate better terms with Keen.

In January of 1986, the City Manager wrote to Keen asking him to provide the survey required under Ordinance 85-53(am). In February of 1986, the 1984

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[13] See footnote 2, supra.

conditional use permit was due to expire. However, the City Assembly renewed and extended it in Ordinance 86-11. The new permit was not to expire until eighteen months after entry of final judgment in a lawsuit over air rights that Keen was involved in, or one year after the effective date of Ordinance 86-ll, whichever was later.

Several months later, in October, the city Manager wrote to Keen again asking for the survey required by Ordinance 85-53(am). A few days later, however, the City Manager wrote back and explained that the need for the survey could be postponed until the Planning Commission decided whether the project was consistent with planning and zoning standards. In November of 1986, the City Manager reported that Keen's new plan for the tram raised several planning and zoning problems that would entail rezoning and a lengthy public process. He felt that the new plan may not be workable and suggested looking for alternative plan.

In the meantime, Keen did apply for a zoning change for the land near his mining claims but because of the numerous problems identified with that plan, he cooperated with city staff to find an alternative route. The alternative agreed upon called for the terminus to be back on South Franklin Street, but this time located on municipal land to avoid the air rights dispute that disrupted in the first plan. A near conditional use permit was issued for the new plan in April of 1987. The new permit was to expire in October of 1988.

To effectuate the land transfer contemplated by this third plan, another Ordinance was introduced to the Assembly. This Ordinance, number 87-30, provided that the City would transfer land on South Franklin to Keen for the terminus in exchange for the release of the tunnel claim. The Ordinance was hotly debated at the Assembly meeting on May 4, 1987, and it ran into heavy public opposition. Of primary concern was the lack of an appraisal on the value of the tunnel claim. It was defeated by a 4 to 3 vote of the Assembly.

Since July of 1985 when Ordinance 85-53(am) had been passed, three other events of importance were taking place.

First, in mid-1986, Alaska Trams filed for Chapter 11 protection under the bankruptcy code so that it could reorganize. Next, the City's attorneys began to interpret Ordinance 85-53(am) as a narrow ordinance designed to settle the tunnel claims by authorizing the city Manager to negotiate a settlement and to transfer City land as part of the deal. Keen, on behalf of Alaska Trams, has always contended that the Ordinance was a contract that required the city to act, not just negotiate. Finally, the City's attorneys, other city personnel, and some Assembly members, came to believe that Keen's tunnel claim was worthless and they ordered an appraisal to value that claim.

Another Ordinance was introduced to the Assembly just after the defeat of Ordinance 87-30. This Ordinance, numbered 87-34, was introduced in June of 1987. After its introduction, the parties began to negotiate changes to address certain of the problems that defeated Ordinance 87-30. Also, before the revised version of the Ordinance was taken up by the city Assembly, the appraisal of the mining tunnel claim was completed. This appraisal suggested the claim had a value of zero. As a result, the Assembly directed stars to remove certain reversion any repurchase provisions in this latest version of the Ordinance and to provide for a sale of City land at fair market value subject to a discount to reflect the litigation value of Keen's claim. This third version of the Ordinance was eventually passed by the Assembly.

Keen did not support this Ordinance. He refused to negotiate the fair Market value. Apparently, to get around the stalemate, Keen suggested that the tunnel claim issue be handled separately from the land purchase issues. In fact, by this time, Keen had filed suit against the City over the tunnel claim in the bankruptcy proceeding. In response to the suggestion to separate the issues, the City passed Ordinance 88-03. This Ordinance authorized the sale of the land and air rights needed by Keen without compromise to his tunnel

claim. Also, the ordinance required that Keen satisfy several pre-conditions before any land transfers could occur. These conditions were to be met by December 5, 1988.

There were additional delays. Keen was unable to get bankruptcy court approval to pursue the options under Ordinance 88-03 and did not obtain the required surveys. The Assembly extended the deadline, and finally on July 12, 1989, after all obstacles were resolved, the land transfers were completed.

While the land transactions were being resolved, the 1987 conditional use permit was set to expire in October of 1988. Prior to the expiration, Keen applied for a "fast track authorization" permit that would allow him to build the project in phases. The permit was applied for in the name or Alaska Trams and a new Keen corporation, Mount Juneau Enterprises Incorporated, and was eventually granted. This fast track permit allowed excavation work to start at the South Franklin site. The permit required that the work be started by April 28, 1989, and it required that the work continue until completed.

The starting date under the permit was extended until October of 1989. The work was finally started then and continued on and off until late spring of 1990. At that point, a retaining wall was needed to stabilize the excavation site. However, Keen left on a trip, some of his equipment was stolen or vandalized, and he ran into other difficulties that delayed further work at the site. The city complained about the delays and warned Keen that his permit would expire unless work continued. Then, in September of 1990, Keen's primary creditor moved the bankruptcy Court to convert the Chapter 11 reorganization to an involuntary Chapter 7 bankruptcy. Keen told the City that because of the conversion motion he could not work.

In October of 1990, the City decided that it was willing to extend to permit, in spite of the delays, if Keen provided liability insurance and a bond to insure completion of the wall. Keen did submit an insurance policy and a commitment from a construction company but these did not

meet the City's specifications. The City set a January 22, 1991, deadline for providing the insurance coverage and the building commitment.

In the meantime, the bankruptcy was converted to an involuntary Chapter 7 proceeding, and the City began to deal with the bankruptcy trustee, Gordon Zerbetz and his attorney, Eric LeRoy. The insurance coverage and building commitment deadline was extended by the City, at the request of the bankruptcy trustee, until February 1, 1991.

On January 25, 1991, the City Manager, Kevin Ritchie, was interviewed by a radio reporter. Ritchie said that he could not think of a good reason to extend the permit past its last expiration date for Keen but that the City would cooperate with the bankruptcy trustee.

Finally, after the deadline, the insurance was posted and a contractor did sign an agreement to complete the work if Keen failed to complete it. However, the contractors guarantee was conditioned on Mount Juneau Enterprises, the new Keen corporation, retaining the building permits.

After the bankruptcy trustee became involved, the City opened discussions about the status of the permit. The City informed the trustee that if the project was cancelled for reasons outside the applicant's (Alaska Trams') control, the City would be able to refund $27,000 of unexpended building permit fees to the bankruptcy estate. The trustee's attorney informed the City that the project was cancelled.

Immediately, Mount Juneau objected to the cancellation. A motion was filed before the bankruptcy court seeking to stop the cancellation or the permit. After a hearing on the motion, the bankruptcy judge refused to enter any order. The judge did suggest, however, that the trustee could not unilaterally abandon the permit, and furthermore, if he took any action that affected the permit he had to give notice to all creditors and put on a hearing.

Given the bankruptcy judge's position, City personnel met with Keen to work out a reasonable period to complete the retaining wall. The meeting was difficult. Keen believed that Ritchie's statements to the radio reporter and to a newspaper effectively ended his hopes for financing and caused great injury to his project. Keen said he would not discuss resolving the matter unless the City took out a full page newspaper ad apologizing to him. He explained that if the ad was not taken out "we are going to war and we're going to do it quick."

At the meeting, the City agreed to confirm in writing that the permit was valid and that Keen could proceed under the permit. On April 5, 1990, the City extended the time period within which Keen was to complete the retaining wall until May 31, 1991.

The City did not put an ad in the paper; Keen did not comply with the May 31st deadline and the complaint in this case was filed on June 26, 1991. On July 24, 1991, the city attorney informed Keen that the permit had expired.

THE CITY'S MOTION FOR SUMMARY JUDGMENT ON THE NON-TUNNEL CLAIMS

The Complaint alleges several causes of actions. These causes of action are described as a breach of contract based on failure to perform under the Ordinances (count 6), breach of contract based on threats to cancel the permits (count 7), manipulation of the bankruptcy process (count 8), slander of permits (count 9), breach of fiduciary duty inherent in granting the building permits (count 10), conspiracy to violate the bankruptcy stay and seize the permits (count 11), conspiracy to prevent the financing and building of the Mt. Juneau tramway (count 12}, fraud and deceit by the City to profit from, and interfere with, the Mount Juneau Tramway (count 13), ultra vires actions by City officials and the Assembly (counts 15 and 16), and finally, punitive damages (count 17).

A. Ordinance 85-53(am) -- Count 6

The City moves for summary judgment arguing that Ordinance 85-53(am) is not a contract and even if it is a contract, the city did not breach it, Alaska Trams did.

An ordinance may constitute an offer to contract. 1 Williston, Williston on Contracts at 282-283 (4th ed. 1990).

Hear, the language of the Ordinance supports Alaska Tram's argument that it established the terms of the settlement agreement between the parties. The City does not seriously dispute that the Ordinance established certain rights and duties in the parties. Both the City and Alaska Trams argue that the other party breached the duties established by the ordinance. The court concludes that the Ordinance did establish rights and duties and that the real issue is whether the parties complied with their obligations.

There is no legitimate issue in dispute on this claim. Alaska Trams was required, as a condition precedent to the City's performance, to provide a stamped survey showing the location and size of the easement that could be approved by city staff in accordance with planning and zoning ordinances. This was never done. It does not matter whether the Assembly was aware of Alaska Trams decision to move the lower terminus to Gastineau Ridge when the ordinance was passed. The important issue is whether the plan to establish the tourist Attraction on Gastineau Ridge could have met planning and zoning requirements. After considering this issue, the City staff concluded that the new plan raised significant planning and zoning problems and it would entail a lengthy public hearing process. The City suggested an alternative route be considered and offered to help Alaska Trams agreed to this.

A new route was planned and eventually land transferred and work began. There is no breach by the City, or by Alaska Trams for that matter concerning the new plan. The parties just agreed to do something else. Summary judgment is granted in favor of the city on this issue.

B. The Building Permits (Counts 7-8)

Alaska Trams claims that the city breached its contract "evidenced by the building permits" by failing to comply with the permits and by manipulating the bankruptcy proceedings. The City moves for summary judgment on these counts arguing that Alaska Trams failed to exhaust administrative remedies before bringing suit. Alaska Trams responds by arguing that the administrative remedies were never made available, that the City's position on the permits constantly
changed, and that the permits were taken without due process of law.

The Alaska Supreme Court, in Eufemio v. Kodiak Island Hospital, 837 P.2d 95, 98-99 (Alaska 1992), held that three issues must be resolved when applying the exhaustion of administrative remedies doctrine. First, the court must consider whether administrative exhaustion is required. Second, if it is, then the court must consider whether the remedies were exhausted. Third, if the remedies were not exhausted then the court must decide whether the failure should be excused.

A City ordinance provides for an independent board of appeals to hear appeals from decisions by the City concerning building issues. CBJ Ord. 19.04.101(d). In Ben Lomond, Inc. v. Municipality of Anchorage, 761 P.2d 119, 121 (Alaska 1988), a builder's building permit was revoked. The Court held that the doctrine of exhaustion of administrative remedies is to allow an agency the chance to apply its special expertise, to correct its errors and to make a factual record. Id. at 122. The Court also held that "requiring exhaustion is particularly appropriate where a complainant raises both constitutional and non-constitutional issues...because successful pursuit of a claim through the administrative process could obviate the need for judicial review of the constitutional issues." Id.

Alaska Tram's argument that administrative review was not offered is without merit. There is no

evidence to suggest that Alaska Trams was denied access to the appeal board. The argument that the City kept changing positions is factually correct, but these changes were, in most cases, to accommodate Alaska Trams. In those instances where the City remained firm, Alaska Trams always had the option of the appeal. Furthermore, the City's final position on the start up date for the retaining wall was clear - May 31, 1991. That deadline passed and now the City considers the permit to have expired.

The court concludes that the issues surrounding the permits were required to be reviewed by the appeals board. Since Alaska Trams did not pursue these issues before the appeals board, the court must decided whether it was excused from seeking administrative review.

Alaska Trams has not argued or presented any evidence that would support excusing its failure to seek review from the appeals board. The method of the review was not contested. See, Kleven v. Yukon-Koyukuk School District, 853 P.2d 518, 525 (Alaska 1993). Initially, Keen did not even argue that administrative review would have been futile. See, Casey v. City of Fairbanks, 670 P.2d 1133, 1136 (Alaska 1983). In subsequent pleadings this issue was raised. Other then certain general allegations of the City's unfairness that are discussed below, Keen offered no proof that the independent appeal process established by ordinance would not provide a full and fair review. Furthermore, and of significance here, an appeal concerning Keen's gift cart permit was settled favorably to him. This certainly undercuts Keen's concerns about the futility of such action. Finally, he argues that review was not offered or possible under the circumstances. As noted above, this is not correct. There is no issue in dispute on these claims. Summary judgment is granted in favor of the City.

C. The Tort Claims (Counts 9-13)

Counts 9-13 allege tortious actions involving the permits. The City asks the court to award summary judgment to it on two affirmative defenses. First, it asserts that the statute of limitations bars any claims arising before June 26, 1989, as a matter of law. Second, the City argues

that it is immune from liability for damages for actions taken with respect to the permits.

The Complaint was filed on June 26, 1991. Therefore, according the City, under AS 09.10.070., any claims arising before June 26, 1989, are barred. Alaska Trams argues that the "continuing nature and extend" of the individual City defendants' acts were not known until the completion of discovery.

It is unclear from the pleadings exactly what claims are based on conduct that occurred prior to June 26, 1989. While both parties are correct in their interpretation of the law concerning the statute of limitations, the court does not believe that this issue must be decided. This immunity defense resolves these claims.

The City argues that it is immune from liability for actions taken with respect to the building permits. The City relies on AS 09.65.070(d). The applicable provisions of this statute read:

> (d) Not action for damages may be brought against a municipality or any of its agents, officers or employees if the claim
>
> ...
>
> (2) is based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty by a municipality or its agents, officers, or employees, whether or not the discretion involved is abused;
>
> (3) is based upon the grant, issuance, refusal, suspension, delay or denial of a license,

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[14] No person may bring an action (1) for libel, slander, assault, batter, seduction, false imprisonment, or for any injury to the person or rights of another not arising on contract and not specifically provided otherwise...unless commenced within two years.

permit, appeal, approval, exception, variance, or other entitlement, or a rezoning.

The City first argues that the actions of its employees or agents were discretionary under AS 09.65.070(d)(2) and therefore, this immunity provision applies to this case. Discretionary functions include policy making decisions, decisions to undertake an action or planning decisions. State v. I'Anson, 529 P.2d 188, 193 (Alaska 1974). Once the decision is made and the action selected, the manner in which the action is carried out is operational conduct and that conduct must be performed safely. Id. Discretionary acts "are those which require 'personal deliberating, decision and judgment...'" Integrated Resources Equity, Corp. v. Fairbanks North Star Borough, 799 P.2d 295, 301 (Alaska 1990), quoting, Utah State University of Agriculture and Applied Science v. Sutro & Co., 646 P.2d 715, 721 (Utah 1982).

Since all the complaints raised by Alaska Trams concern decisions made by City personnel or the City Assembly, the immunity provided by AS 09.65.070(d)(2) applies. However, Alaska Trams extends the argument by claiming that the employees and/or the City Assembly acted without authority and that in taking some action they violated clearly established law.

In order to establish liability, the government must have "violated 'clearly established' law, unless the [government] can prove that [it] non-negligently [was] not aware of the law." Integrated Resources, 799 P.2d at 301 (citing Breck v. Ulmer, 745 P.2d 66, 72-73 (Alaska 1987)). The violation must be in exercising a purely ministerial function as opposed to an exercise of judgment in e interpretation of the law as applied to the particular facts. Id.

Alaska Trams does not point to any specific instances or provide other evidence that the City and the other defendants knowingly acted without authority or in violation of the law. Alaska Trams merely claims that "memoirs of the City Attorney and City Manager provide direct evidence that they were entirely aware of the unlawful nature of their

actions." Presumably, this is in reference to memos written by the City's legal department evaluating possible claims which might be made against the City regarding the permits. This is not evidence that the City knew that it was violating the law. It is simply an attorney's review of the problem and the possibilities. This kind of advice and a description of the legal strong and weak points of a position are merely preludes to the decisions. The advice may be wrong and the decision may be wrong, but immunity still applies. See, Troxel v. Town of Basalt, 682 P.2d 501, 503 (Colo.App. 1984).

Alaska Trams claims that City employees acted deceitfully and fraudulently and that they defamed Alaska Trams. If this were true then immunity would not protect the City. However, other than the allegations raised in the Complaint, there has been no effort to support these claims. The City argues that the alleged fraudulent and deceitful acts that occurred before June 25, 1989, are barred by the statute of limitations. The court has not reached this issue. What can be said about these allegations, however, is that even though Keen did not like many of the actions taken by the City Attorney, the Planning Department employees and the City Manager, he has not shown that nay of these employees' decisions and actions were deceitful., fraudulent, defamatory or that the acts were unauthorized.

For example, much is made of the agreement to refund $27,000.00 in permit fees if the Bankruptcy Trustee cancelled the project. Keen complains that this action is clear evidence of the City employees' fraud and deceit. But he has not demonstrated how this is unlawful or why it is fraudulent or deceitful. It appears to be a reasonable effort to put to rest a long, complicated and difficult situation that had been exacerbated by Alaska Trams' long delays, inability to proceed even on the initial phase of the project and bankruptcy.

Keen also complains about the unauthorized resistance demonstrated by City employees to his project. This is not a fair reading of the record. What appears from the record is that his project, once embraced by the City leaders in the mid-seventies to the mid-eighties, simply ran

low on political support. After the modification to the original plans and the determination that the tunnel claim was worthless, all attempts to further this project ran into greater public opposition. A natural and direct result of public opposition is political reaction. This City's early embrace became a political liability. It is not that the City acted fraudulently or deceitfully, the City simply was caught, as was Keen, in a changing political current. The tram still could have gone forward but Keen would have been required to meet the greater demand imposed by the more vehement public scrutiny and opposition. Keen has pointed out several negative inferences that can be drawn from the City's cautious approach to this project. But these unsupported inferences alone do not create a material issue in dispute with respect to his claims of fraud and deceit.

Finally, the conduct supporting the defamation claim is not apparent. Perhaps Keen is alleging that the City Manager's comments to the radio reporter on January 25, 1991, are defamatory. If this is the allegation it fails. The City manager was simply reporting the current status of the permit. It is not clear how this is defamatory.

The City also claims that the conduct regarding the building permits is immune under AS 09.65.070(d)(3). The purpose of this provision is to "protect the public treasury by barring actions seeking money damages for injuries alleged to be the result of municipal licensing, permitting, entitlement and zoning procedures and decision." J & L Diversified Enterprises, Inc. v. Municipality of Anchorage, 736 P.2d 349, 352 (Alaska 1987).

Alaska Trams argues that this statute does not apply here because it does not cover the cancellation of a permit. The statute provides immunity for the "refusal," the "suspension," the "delay" or the "denial" of a permit. While the statute does not say cancellation, a fair reading must include actions taken that would end the applicant's ability to build the project. Reading the statute this way comports with the Supreme Court's holding in J & L Diversified Enterprises, 736 P.2d at 352, that the statute should be

construed broadly. Furthermore, the permit in this case was not cancelled. It was repeatedly modified and extended. All of the extensions were for Alaska Trams' benefit. The modifications were attempts by the City to protect itself from liability and to comply with the permitting process. While Alaska Trams could have sought administrative review of these actions, it chose not to. In the end, the permit was still valid but Keen let it expire without taking action.

Summary judgment on the grounds of statutory immunity under AS 09.65.070(d)(2) and (d)(3) is granted in favor of the City.

D. Ultra Vires Actions (Counts 15-16)

Counts 15 & 16 of the Complaint allege that City employees and the Assembly committed unauthorized acts and therefore violated the doctrine of ultra vires. These issues have been dealt with above. The employees acted within their authority as did the Assembly. Alaska Trams has not offered any contrary evidence. Summary judgment is granted to the City on counts 15 & 16.

E. Punitive Damages (Count 17)

Count 17 asks for punitive damages in compensation for the wrongs committed by the City against Alaska Trams. Given the rulings above, summary judgment must also be granted against Alaska Trams on its claim for punitive damages.

OTHER MOTIONS

Pending decision on the motions for summary judgment, Alaska Trams has filed three additional motions and the City has filed one more as well. The first motion

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[15] In J & L Diversified Enterprises, the Court held AS 09.65.070(d)(3) applicable to an allegation of abuse of process against a municipality even though the statute did not explicitly exempt municipalities from these actions. Id.

filed by Alaska Trams was to stay ruling on the motions for summary judgment pending further discovery under Alaska Rule 56(f). This motion was denied by the court in October of 1993. Requests under Alaska Civil Rule 56(f) are usually freely granted. Jennings v. State, 566 P.2d 1304, 1313 (Alaska 1977). However, when the moving party has been dilatory or the requested additional discovery is merely cumulative, the motion should be denied. Id.; 10A Wright, Miller & Kane, Federal Practice and Procedure, Section 2741 at 558 (2d ed. 1983). Furthermore, the Rule requires that an affidavit be filed with the motion setting forth why the facts essential to defeat the motion for summary judgment are not available. Jennings, 566 P.2d at 1313-14; Munn v. Bristol Bay Housing Authority, 777 P.2d 188, 192-93 (Alaska 1989).

Here, Alaska Trams did not file an affidavit as required by the Rule. In this case such an affidavit is essential. As noted in Wright, Miller and Kane, and quoted in Munn, "While 'a few courts' have required a party invoking Rule 56(f) to show what facts are sought through further discovery and 'what steps have been taken to access them[,]... these requirements have [generally] been imposed only when the court is skeptical about a genuine issue ever emerging, or when the party opposing summary judgment has been less than diligent in employing discovery.'" Federal Practice and Procedure, Section 2740 at 530-32, quoted in Munn, 777 P.2d at 193. In this case, the court does not believe a genuine issue in dispute will emerge from further discovery. Further, and most importantly, given the tremendous volume of discovery undertaken to date, the court seriously questions the diligence of Alaska Trams.

Alaska Trams had sixteen months to conduct discovery in this case. (The suit was filed in June of 1991 and judge Schulz imposed a stay of discovery in November of 1992.) During that time thousands of pages of documents have been disclosed, numerous depositions have been conducted, alleged privileged materials have been turned over or offered for inspection in camera. The deposition of the City's attorney, Barbara Blasco, alone, was close to 1000 pages. Despite all this, Alaska Tams now wants to depose

the remaining parties not previously deposed, depose additional non-parties, and re-depose Barbara Blasco.

The requirement of the affidavit is fundamental in a situation like this. Alaska Trams' failure to establish that the people it now wants to depose were not available or were uncooperative or that it was somehow stymied from conducting these depositions during the sixteen month discovery period mandates that the motion be denied. The failure to establish that it did not have access to the alleged privileged materials in Blasco's file and to explain why the questions now so important to its case were not asked Blasco during the 900 plus page Blasco deposition also require denial of the motion.

Next, Alaska Trams filed a motion for a preliminary injunction. Given the decision on the motions for summary judgment, this motion is denied. Keen has failed to show irreparable harm. Furthermore, as has always been the case, Keen is free to apply for a new permit.

Alaska Trams filed a motion to file a supplemental affidavit on September 30, 1993, a notice concerning the gift cart permit on January 10, 1994, and a motion to supplement the record on January 24, 1994. The two motions are granted and the court has reviewed the affidavit and documents in reaching summary judgment decisions. The notice is also accepted for filing and has been considered as well.

Finally, the City has moved to strike certain materials filed by Alaska Trams on September 20, 1993. The City argues that the petitions and news articles supporting the tram are not relevant. The court agrees. These documents have been reviewed and the court can find no legitimate evidentiary or legal purpose for the materials. Alaska Trams' "Notice of Filing" is stricken from the record. The City asks for costs for having to file the motion. This request is

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[16] The court normally would have waited for the City's response to the last motion to supplement the record. However, further delay is not appropriate.

partially granted. pursuant to Rule 95(a), the plaintiffs are to pay the defendants the sum of $300 for having to file the motion.

Dated at Sitka, Alaska, this 31st day of January, 1994

Larry C. Zervos
Superior Court Judge